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## IN THE CIRCUIT COURT OF PULASKI COUNTY.

R. C. GRAHAM *v.* WESTERN UNION TELEGRAPH COMPANY.

Feb. 15, 1908.

**Telegraph Companies—Section 1294 h. (5) Virginia Code 1904—Rules and Regulations—Delivery of Messages to Company.**—1. Delivery of a written message to the operator of a telegraph company whilst acting as messenger and whilst delivering a telegram, and acceptance of such message for transmission by the operator away from his office, constitutes delivery to and acceptance by the company, though such message is not written upon one of the blanks provided for messages, and the company will be liable for failure to transmit such message as required by § 1294 h. (5) Virginia Code 1904.

2. The sender of such message is not bound by a regulation of the company to which he has not assented, providing that in such case, the one receiving the message shall be deemed the agent of the sender to deliver the message to the transmitting office.

Quære. Whether a messenger boy who received a message written on the company's blanks would in such case be the agent of the sender.

3. No liability attaches to a telegraph company for failure to transmit a message until a complete message has been delivered or tendered for transmission.

4. The agent of a telegraph company has no implied authority to frame messages for the sender, and in undertaking to frame a message, the substance of which has been given by the sender, he acts for the sender and not for the company.

5. Telegraph companies have the right to make reasonable rules and regulations for the conduct of their business, and a regulation of a telegraph company requiring that messages delivered for transmission shall be in writing is a reasonable regulation.

6. Though a message is not framed or put in writing by the sender, yet if the message is accepted for transmission by the company, the company will be liable for any default in the handling of the same thereafter occurring.

Action of debt in Pulaski County Circuit Court to recover the statutory penalty for alleged failure of the defendant to transmit a message or dispatch from St. Paul, Virginia, to Pulaski, Virginia.

*Wysor & Gardner*, for plaintiff.

*W. B. Keglev*, for defendant.

THORNTON L. MASSIE, J. This is an action of debt brought to recover the statutory penalty of \$100.00 for failure to transmit

and deliver a telegraphic dispatch under § 1294 h (5) Pollards Code, as amended by Acts of 1906, p. 545.

By an understanding between the parties the jury heard the evidence and without instructions from the court rendered a verdict in favor of the plaintiff, and the questions involved are raised by motion to set aside the verdict as contrary to the law and evidence, there being no dispute as to the material facts, which are as follows:

On the 2nd day of July, 1908, L. B. Moyers, the telegraph agent and operator at St. Paul, Va., who also acted as messenger and delivered telegrams to addresses at that point, delivered to plaintiff at the St. Paul Bank, where plaintiff had gone to transact some business, a telegram from plaintiff's wife, who was then at Pulaski, Va. After reading the telegram then delivered to him by the operator, plaintiff requested him to answer the message, and to say in the message that he, plaintiff, would be busy day and night until the 6th, and would write. No message was written out by plaintiff; the price of transmitting the message was not paid at the time, because it was not known how many words would be in the message, but the message should contain no more than ten words when sent, for which the usual charge was twenty-five cents.

The plaintiff testifies that on the next day he went to the defendant's office at St. Paul, and asked Moyers the operator, whether he sent the message and was told that the message was sent and that it contained exactly ten words, thereon plaintiff handed the operator the price of transmission, viz: twenty-five cents. The witness stated that it was his understanding that the message had not in fact been written out by the agent or sent.

The operator testified that he was requested by plaintiff, when he delivered to him the message from his wife, to answer the telegram and to say, in substance, that he was busy day and night until after the 6th and would write, but the message was to be so framed that it would not contain more than ten words, and that the plaintiff handed the operator twenty-five cents to pay for the transmission of the message. That he had several other errands to attend to before he went back to his office which he did attend to and that this matter entirely escaped his recollection and he did not write out the message as requested and did not send or attempt to send it. That he did not recall the transaction until some time afterwards, when complaint was made by plaintiff. The twenty-five cents paid him was not entered upon the books of the company or reported until complaint was made afterwards, when he sent it to the Superintendent. When plaintiff requested him to send the message he did not offer to write it out and did not ask for a blank to write it on. Witness further stated that he had no recollection

that plaintiff made any inquiry next day about the message or that the twenty-five cents was paid the next day. He further stated that he had no authority to receive verbal messages, but that on the contrary Rule 1 of the defendant was as follows:

"Each message for transmission will be written upon the form provided by the Company for that purpose, or will be attached to such form by the sender or by the person presenting the message as the sender's agent, so as to leave the printed heading in full view above the message."

A copy of these forms was offered as evidence upon which there are printed a number of rules and regulations. None of these however are material to the issues involved in this case, except one which reads as follows:

"No responsibility regarding messages attaches to the Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to the office by one of the Company's messengers, he acts for that purpose as the agent of the sender."

The plaintiff had sent and received a number of messages either for himself or his bank, where he was employed prior to the time in question, and these messages were either written upon the usual telegraph blank or upon other paper and attached to the blank in accordance with the Company's rules.

It was further shown that it was against the rules of the Company, which the operator could not waive or vary, to accept verbal messages, and that there was no custom prevailing at St. Paul to receive messages in this form.

The plaintiff admitted that he had sent messages upon the forms provided by the Company and identified the form introduced in evidence as a form similar to the ones furnished by the Company to its patrons.

The first question to be decided is whether there was any obligation upon the defendant to send the message which the plaintiff desired sent. In other words did the plaintiff deliver to the defendant a "dispatch," which it was the duty of the defendant to "receive and transmit" as required by § 1294 h (5) Pollard's Code 1904, as amended by the Acts of 1906, p. 545? It is conceded that the message was not transmitted and that no effort was made to transmit it, but it is contended that a proper message or "dispatch" was delivered and "received" and that being so it was the duty of the defendant to transmit it "faithfully, impartially, with substantial accuracy, as promptly as practicable, and in order of delivery to said Company." If the message had been written out by plaintiff, upon a blank piece of paper, and the operator who was also acting as messenger had received it, the Company would undoubtedly be held liable for the

penalty, because in receiving it at a point away from the defendant's place of business he would be acting not only within the apparent scope of his authority but within the implied authority given him by a rule printed on the message blanks above quoted. And the Company would be held liable even if it were shown that the messenger had lost the message before returning to the office or had forgotten to deliver it at the office. Nor would the Company be allowed to escape liability by reason of the limitation contained in the rule quoted, which undertakes in such cases to make the messenger the agent of the sender, because in the absence of a contract restricting its liability, the Company cannot rely upon the conditions and restrictions upon the message blanks which were not signed by the sender. *Western Union Tel. Co. v. Powell*, 94 Va. 277.

Whether the Company would be held liable if the sender had signed the message blank containing this limitation because such a limitation would be an effort to limit the liability for its own negligence, is a question of some difficulty and need not be here decided.

The sender of a message who signs a message written on one of the blanks of the telegraph Company is bound by all the reasonable rules printed thereon, which are not in conflict with the Statute, but he is not bound by a regulation or rule which limits the liability of the Company for the improper or negligent conduct of its servants. *Western Union Tel. Co. v. Reynolds*, 77 Va. 173. Code Sec. 1294 h (9).

But there is respectable authority holding that the messenger would in such case be acting as the agent of the sender. *Stamey v. Tel. Co. (Ga.)*, 44 Am. St. Rep. 98.

In this case, the message was not written either upon a blank piece of paper, or upon a blank furnished by the Company, and under the evidence two questions are presented for decision.

1. Did the sender deliver to the defendant a verbal message?
2. If so, is the defendant liable under the Statute for failure to transmit a verbal message?

Whether a message should be written or verbal (which will hereafter be considered), a *message* must be delivered. Until that is done no liability attached to the defendant for failure to transmit. It is not the duty of the Company to *frame messages*; its duties are confined to transmission and delivery of messages, already framed and ready for transmission. In this case according to plaintiff's own testimony he did not frame the message, but on the contrary gave the agent only the substance of the message and requested him to so frame it as to make a message of not exceeding ten words. In doing this the plaintiff made the messenger his own agent to frame the message, and the

duty of the Company to transmit it could not arise until the messenger should perform the commission entrusted to him by his principal who was the plaintiff, and since it was never performed, the duty to transmit did not arise at all, and there can, therefore, be no breach of duty. But conceding for the sake of argument that a perfect and complete message was given to be transmitted I am of opinion that there can be no recovery in this case because the message was not written. The Statute does not define what a "dispatch" is, nor does it in terms require the receipt and transmission of oral messages.

The telegraph Company not being required in terms or by necessary implication to receive and transmit oral messages, the Company has the right to pass reasonable rules and regulations as to the form of the message. The Company has such a rule. This rule requires messages to be in writing.

Telegraph Companies, like Common Carriers, have the right to make reasonable rules and regulations for the conducting of their business. The right to make and enforce them is a necessary incident of the business. 25 Am. & Eng. Ency. Law, p. 1037. But such regulations must be reasonable and must not undertake to limit the liability of the Company for its negligence. Code Sec. 1294 h (10).

It is contended that plaintiff is not bound by this regulation requiring messages to be written because it is not shown that he had knowledge of and assented to the rule.

It is true that a sender is not bound by a regulation of which he has no knowledge actual or constructive which limits the liability of the Company as a general rule, but this rule of law has no application here. The question here is: Did the agent or messenger have the authority to receive an oral message, and if he did receive such a message is the Company bound by his actions?

If the agent was authorized to receive it, or if after receiving it without authority the Company ratified his act in any way or undertook to send it, the Company could not limit its liability by even a reasonable regulation, unless it were shown that the sender gave his assent to the regulation in some way, but persons dealing with an agent are bound to ascertain the extent of his authority to bind his principal. If the agent had no authority to act, or was not acting within the apparent or implied scope of his authority, the principal is not bound, and it matters not whether the person dealing with the agent knew of the extent of his authority or not. These principles are elementary. After it is shown that the Company is liable for the act of the agent, and there is an obligation upon the Company to perform some duty, then the sender of a message is not bound by a regula-

tion limiting its liability for a breach of duty, unless the sender's assent, either express or implied, is shown. The question is simply a question of agency. The rule of the Company does not allow its agents to receive oral messages. The message was not written out, nor did the Company undertake to transmit it. No written message was ever delivered at the office of the Company.

It is not within the express, implied, or apparent authority of a messenger to receive an oral message, and a rule requiring messages to be in writing has been held to be a reasonable rule. *Western Union Tel. Co. v. Wilson*, 30 Am. St. Rep. 26 (93 Ala. 32); *People ex rel. Cairo Tel. Co. v. W. U. T. Co.*, 36 L. R. A. 627 (Ill).

In the latter case the Supreme Court of Illinois held that a telegraph company was not required to receive an oral message, and that a rule requiring such messages to be written was a reasonable rule. The Court said: "It is a matter of common knowledge that messages must be written, and whether the conditions and limitations referred to in defendant's answer are reasonable or not, or whether the public be requested to assent to them or not, the defendant undoubtedly has the right to require that messages be written. The risk of mistake, the liability of disputes as to what was said, the uncertainty of the identity of the persons communicating (where the message is telephoned) and other difficulties which will readily suggest themselves, would increase the hazard of the service very greatly." To the same effect is the case of *Western Union Tel. Co. v. Dozier*, 67 Miss. 288, cited in note to *Tel. Co. v. Jones*, 30 Am. St. Rep. 581.

The case of *Carland v. Tel. Company*, 74 Am. St. Rep. 394 referred to by plaintiff's attorney is not in conflict with these views. The question there decided was whether the agent who undertook to write a message 'phoned to the office, on one of the Company's blanks, was then acting as the agent of the sender or of the Company. The court held that he was acting as the agent of the Company, because he was at that time at the office of the Company for the purpose of receiving and transmitting messages, and in receiving the oral message and writing it out he "was acting within the general scope of his authority" and he was not bound by a regulation of the Company which made him the agent of the sender in writing out the message, unless it were shown that he assented to it.

The facts of that case and the one under consideration are wholly different. In that case the message was delivered at the office of the Company, to the person who was authorized by the Company to receive and transmit it. Here the oral message, if there was a message, was delivered to the operator on the street, away from the office and when he was not performing the duties

of the operator, but when he was performing the duties of a messenger boy. It could not be contended that a messenger boy would be acting within the scope of his general authority in accepting an oral message. If, however, the oral message had been delivered to the operator at his place of business and he had either written it out or transmitted it without requiring it to be written, the Company would be held liable for any subsequent breach of duty.

I am, therefore, of the opinion that the verdict is contrary to the law and the evidence, and the same is set aside.

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**IN THE CORPORATION COURT FOR THE CITY OF  
ROANOKE, VIRGINIA.**

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SCHOLTZ *v.* GAMBILL.

(March, 1909.)

1. A substantial compliance with the law regarding the posting of notices of an election is sufficient. If the people in fact did have sufficient knowledge of the pending election, from such posting of notice, the notice is sufficient.

2. The illegal acceptance or rejection of voters, if it is wholly insufficient of itself to affect the result of the election, is not ground for invalidating it.

3. It is a mandatory constitutional requirement that the treasurer shall prepare and furnish for the use of the judges of an election a list of all persons who had personally paid their poll taxes for the three years next preceding that in which the election is held. It is an essential prerequisite to a regular and legal election.

4. The treasurer's list is a species of registration, upon which a citizen's name must appear, unless he be an old soldier, to entitle him to vote, and if it be so tainted with uncertainty as to amount to no list at all, the election is illegal.

5. The statements upon the face of the treasurer's list, however explicit and emphatic, are not incontestible in a contested election in the court to which the decision of such contest is submitted, and fraud, gross irregularity or fatal omission may be shown.

6. The list required by law is a statement of the names of all those persons who the treasurer can swear that he is satisfied have paid their poll-taxes personally within the proper time, which it is his duty to ascertain before he puts a man's name upon the list, and if the list furnished is not in fact such a statement, but merely a collection of